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Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

ROBERT VIGIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 10th Circuit erred in broadening the jurisdictional requirement under the Hobbs Act by holding that indirect depletion of an *individual's* potential assets affect interstate commerce.

2. Whether the 10th Circuit erred in holding that acts amounting to hard bargaining were a violation of the Hobbs Act when this holding conflicts with a prior, relevant decision of this Court reversing a decision of the 10th Circuit.

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OPINIONS BELOW

The January 12, 2007 and January 19, 2007 memorandum opinions and orders of the district court denying Petitioner's Motion to Set Aside Verdict and for Judgment of Acquittal are at App. B and App. C, respectively. Appellant filed a Petition for Writ of Mandamus with the Tenth Circuit on or about August 17, 2006. That action was identified by Court of Appeals No. 06-2230. The opinion of the Tenth Circuit, affirming the district court, is reported at 523 F.3d 1258 (10th Cir. 2008). (App. A).

STATEMENT OF JURISDICTION

Robert Vigil, the Petitioner before this Court, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit. Mr. Vigil was charged with several counts of violating the Hobbs Act, 18 U.S.C. § 1951, § 1952, and one count of attempted extortion under the Hobbs Act. Mr. Vigil was also charged with two counts of violations of the RICO Act under 18 U.S.C. § 1962. The district court based subject matter jurisdiction on 18 U.S.C. § 1951, § 1952. A jury convicted Mr. Vigil only of the single count of attempted extortion on September 30, 2006. The district court entered its judgment on February 22, 2007. The judgment of the court of appeals, affirming the district court was entered on April 29, 2008. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1254(1).

The Hobbs Act:

> Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by

means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.years, or both.

18 U.S.C. § 1951 (1994).

STATEMENT OF THE CASE

This case presents an important and fundamental question regarding the breadth of the Commerce Clause. Specifically, Petitioner asks this court to determine whether, under the Hobbs Act, interstate commerce is affected by the indirect depletion of an *individual's* assets. Additionally this case presents this Court with the opportunity to resolve a circuit split over the distinction between depletion of individual assets and depletion of corporate assets in regards to the Hobbs Act.

The interstate commerce clause was not intended to reach as far as the Tenth Circuit's interpretation. When assets are depleted from a corporate entity which is not yet engaged in commerce, that depletion does not impact interstate commerce. The circuit court's holding that the indirect depletion of an individual's potential future assets affects interstate commerce stretches the commerce clause beyond any reasonable interpretation. Stretching the meaning of interstate commerce has detrimental effects on the fundamental principles of federalism and the balance of power in our government. Such a holding blurs the lines separating state and federal government, over-expands federal power, and unconstitutionally grants Congress the power to regulate nearly every State's individual.

In addition to the significant constitutional issue, this case offers the Court the opportunity to resolve the conflict that the circuit court's decision creates with a relevant decision of this Court. Petitioner requests this Court's guidance to draw a distinction between what is

a Hobbs Act violation and what constitutes 'hard bargaining'. This case arises from the Tenth Circuit, the same circuit this Court reversed one year ago on the same issue involving the Hobbs Act. The circuit court's apparent refusal to apply Supreme Court precedent is yet another reason Petitioner respectfully requests this Court's review.

There has yet to be a case before this Honorable Court that presents the issue of whether interstate commerce is affected when an individual's resources are depleted under the Hobbs Act. Respectfully, it is ripe for this Court's determination.

Petitioner states that federal jurisdiction was present before the United States District Court for the District of New Mexico because he was charged under the Hobbs Act, a federal statute.

STATEMENT OF THE FACTS

I. Introduction

On July 25, 2006, a grand jury returned a Fifth Superseding Indictment, which charged Mr. Vigil with twenty-three counts of extortion under the Hobbs Act and alleged RICO violations and one count of attempted extortion under the Hobbs Act. On September 30, 2006, a jury acquitted Mr. Vigil on all counts of extortion and RICO, but convicted him on Count 24, which was the single count of attempted extortion.

Count 24 alleged that Mr. Vigil, the New Mexico State Treasurer during relevant times, attempted to

extort George Everage to provide "money and property" to a third person, Samantha Sais, in connection with the award of a new state contract for a potential securities lending program for New Mexico. The position sought by Everage would be known as the Securities Lending Oversight Manager ("SLOM"). Samantha Sais was the wife of Mr. Vigil's predecessor as Treasurer, Michael Montoya. George Everage, then an employee of the New Mexico State Treasurer's Office ("NMSTO" or "STO"), proposed the securities lending program to Mr. Vigil as a method of raising income. Everage described securities lending as a program where the STO would lend out securities that it held, such as agency bonds, and would earn additional income on those loans. Under Everage's proposal, the SLOM would oversee a number of security lending agents who would actually place the security lending investments. Before the STO could engage in any security lending through the SLOM position, there would have to have been a separate request for proposals from security lending agents (SLAs). Mr. Vigil decided that, due to budgetary restrictions, if the SLOM position were to be created, it would have to be someone outside the STO who would have a contract with the STO. Everage left the office of the State Treasurer to bid on the contract to oversee his proposed securities lending program as the oversight manager[1], acknowledging that the SLOM position could have been terminated by the STO at any time, should it get off the ground. Mr. Vigil refused to

1. Under New Mexico law, it is a misdemeanor for a government employee to participate in procuring contracts when that employee knows that he has a financial interest in the business seeking or obtaining the contract. N.M.S.A. §§ 13-1-190 & 13-1-199.

accept a proposal for the SLOM without a provision for the hiring of an information technology employee, Samantha Sais. Everage decided that he did not want to hire her. There was never a finalized SLOM contract as a result. Even had there been a finalized contract, several contingencies had to occur before the securities lending program would become operational in New Mexico and before a SLOM made any money.

Part of the government's theory in Count 24 was that Mr. Vigil attempted to extort George Everage as payback to Michael Montoya, pursuant to an illegal kickback scheme that Mr. Vigil previously had allegedly orchestrated with Montoya and other cohorts. This alleged scheme was the basis of the first twenty-three counts of the Fifth Superseding Indictment. The gist of the scheme was that the Treasurer's Office under Montoya would require contractors to pay "kickbacks" in exchange for the award of contracts with the State of New Mexico. Criminal associates Leo Sandoval and Angelo Garcia assisted Montoya to obtain the kickbacks, which were paid by various investment brokers including a man named Kent Nelson. The United States alleged that Mr. Vigil conspired with others to continue this alleged scheme when he took over as Treasurer. The United States' case was based primarily on the testimony of cooperating defendants Montoya, Sandoval, Garcia and Kent Nelson. After several weeks of trial, the jury resoundingly rejected this testimony and the government's theories by acquitting Mr. Vigil of Counts 1-23.[2] Only Count 24 was based on Mr. Vigil's dealings with George Everage.

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2. This was the second trial of this matter. The first trial ended in a mistrial after the jury was unable to reach a verdict on any of the indictment counts.

Mr. Vigil filed Motions to Set Aside the Verdict and for Judgment of Acquittal on October 5, 2006. The Court denied those Motions on January 12, 2007 and January 19, 2007. The Court's Orders are attached hereto as Appendices B & C. Mr. Vigil appealed his conviction for attempted extortion under 18 U.S.C. § 1951, § 1952 and the District Court's denial of his Motions for Judgment of Acquittal to the Tenth Circuit. That Court affirmed the judgment of the district court.

Pursuant to Supreme Court Rule 14(g)(ii), Petitioner states that federal jurisdiction was present before the U.S. District Court for the District of New Mexico because Petitioner was charged under the Hobbs Act, a federal statute.

II. Proceedings in the Underlying Criminal Case

A. No effect on interstate commerce

Mr. Vigil's conduct did not affect interstate commerce. Mr. Vigil, Ms. Saiz and Mr. Everage were and are all from the state of New Mexico. Mr. Everage proposed to perform professional oversight services as the Securities Lending Oversight Manager (SLOM) for the State Treasurer's Office.[3] Mr. Vigil's alleged wrongdoing in negotiating the terms of that SLOM contract with Everage in no way had even a minimal effect on interstate commerce.

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3. Following the trials, Mr. Everage filed a lawsuit against the State of New Mexico and Mr. Vigil for the underlying acts for which the United States Attorney's Office criminally charged Mr. Vigil. In that lawsuit, Mr. Everage averred for venue purposes that all of the acts giving rise to the lawsuit occurred in New Mexico. That lawsuit is pending before the U.S. District Court for the District of New Mexico as case number 07-CV-664.

The cases concerning Hobbs Act prosecutions generally fall within two categories. The first involves a direct connection between the extortion and interstate commerce, which is not at issue here. *See United States v. Mattson*, 671 F.2d 1020, 1023-24 (7th Cir. 1982). The second category involves the "depletion of assets" indirect effect upon interstate commerce. *Id.* at 1024. Within that category, the Seventh Circuit has distinguished Hobbs Act cases involving depletion of a business' assets from those involving an individual employee's assets, which are not likely to satisfy the jurisdictional requirement of the Hobbs Act. *Id.* (holding the extortion of a payment from an individual employed by Playboy Enterprises did not affect interstate commerce). Thus, the Court held in *Mattson* that

> (t)he victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce. Thus, to find an effect on interstate commerce, we would be required not only to consider indirect effects within a single business entity, but also effects arising from the business entity's relationship with an employee not engaged in interstate commerce . . . The Hobbs Act requires that interstate commerce be affected by extortion, not by a result of extortion; there must be a nexus between extortion and interstate commerce before federal jurisdiction is present.

Mattson, 671 F.2d at 1025.

Other circuits have agreed that where the extortion or robbery of an individual has only an "attenuated" or "speculative" effect on some entity or group of individuals engaged in interstate commerce, there is no Hobbs Act jurisdiction. *See United States v. Lynch*, 282 F.3d 1049, 1054 (9th Cir. 2002) (distinguishing between the robbery and extortion of a business and the robbery and extortion of an individual under the Hobbs Act); *United States v. Wang*, 222 F.3d 234, 239 (6th Cir. 2000) ("a small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an employee of a national company . . ."); *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994) (conviction of robbery of a computer company employee reversed on grounds that theft of victim's automobile with cellular phone had an insufficient effect on his employer's business); *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (upholding the acquittal, following guilty verdict, of defendants who beat and robbed two individuals in route to buy beer at a liquor store); *United States v. Buffey*, 899 F.2d 1402, 1406 (4th Cir. 1990) ("Extorting money to be devoted to personal use from an individual does not affect interstate commerce"). Most recently, the Second Circuit overturned its own case law and held that the jury must determine that a robbery itself affected interstate commerce, not just that the robbery's object was drugs or the fruits of their distribution which by their nature affect interstate commerce. *United States v. Parkes*, __ F.3d __, 2007 WL 2317395 (2d Cir. 2007). There, the defendant took part in a scheme to rob a marijuana dealer of drugs and proceeds. He was charged with Hobbs Act robbery and the trial court instructed the jury that it had to find that the robbery

affected interstate commerce. The Court concluded that the district court properly instructed the jury that it must find that the robbery itself affected interstate commerce, not simply that the object of the robbery was to obtain illegal drugs or drug proceeds.

Likewise, Mr. Vigil's alleged extortion of Everage did not affect interstate commerce. In his opinion, Judge Kelly held that "the SLOM contract would have resulted in securities transactions between the STO and multi-state lending agents" and that "[a] rational jury could certainly conclude that Mr. Vigil's acts either actually or potential affected interstate commerce." *United States v. Vigil*, 523 F.3d 1258, 1266-67 (10th Cir. 2008). Appendix B. Without question, securities lending affects interstate commerce. Like in *Mattson*, Playboy Enterprises unquestionably affects interstate commerce. Like in *Parkes*, drugs are necessarily part and parcel of interstate commerce. The alleged extortion in this case, however, like in *Mattson* and *Parkes*, involved an individual, not a business engaged in the interstate economy. Judge Kelly concludes that Mr. Vigil "affected the operations of a business, SECSYS, LLC, formed by Everage." *Id.* at 1266. However, unlike in cases in which businesses are engaged in ongoing activities which impact interstate commerce, SECSYS LLC was merely an alter ego for Everage which had never done any business in interstate commerce. SECSYS was Everage, nothing more and it had done no business yet pending the SLOM contract. At the point in time that the SLOM negotiations failed, SECSYS was not doing any business in interstate commerce and nor was Everage. Mr. Vigil's actions at most affected Mr. Everage's personal assets, not a business involved in securities lending.

In *United States v. Perrotta*, 313 F.3d 33, 35 (2d Cir. 2002), the Defendant was convicted under the Hobbs Act for arranging an assault on a former business partner (Marcus) who worked at a business (FHB) that affected interstate commerce. The government offered evidence that FHB was a mortgage banking firm with clients located throughout the country; that Marcus ran a fifteen-to-twenty-person telemarketing unit; and even a one-day absence by Marcus would affect FHB's business. *Id.*

The Second Circuit, in reversing his conviction, held that merely showing employment with a company that does business in interstate commerce, without more, stretches the Hobbs Act too far. The Court explained that under such a theory, the extortion or assault of anyone who worked in any capacity at any company that participates in interstate commerce would suffice for federal jurisdiction, blurring the boundaries between state and federal jurisdiction. *Perrotta*, at 38, *citing*, *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994). The Court further held, that merely showing a victim of a Hobbs Act conspiracy, assault or extortion worked at a business engaged in interstate commerce is not enough to meet the de minimis showing required to support federal jurisdiction. *Id.*, at 40. Moreover, here, SECSYS was not even akin to the mortgage banking firm in *Perrota*- SECSYS was simply Everage. The Tenth Circuit's decision below conflicts with the Second Circuit's decision in this regard.

Furthermore, the "business" of SECSYS if the SLOM had actually materialized, would have been oversight of activities- not the actual lending of

securities. A securities lending agent would have been hired to lend securities. The SLOM was going to work for the New Mexico State Treasurer's Office as a contractor and would have oversight, monitoring and reporting responsibilities over the activity of the securities lending agents, by analyzing documents which would be maintained by the New Mexico State Treasurer's Office. The SLOM was an independent contractor for the NMSTO in a potential securities lending program which had yet to be finalized. The government also failed to show that the *oversight* of the securities function necessarily affects interstate commerce. Like in *Mattson*, the depletion of Everage's personal assets in favor of Samantha Sais, would have no affect on the interstate economy. "To so hold would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually. Simply stated, the extortion did not affect Playboy, nor interstate commerce through Playboy, but Anderson." *Mattson*, 671 F.2d at 1025. For all these reasons, this Court should respectfully grant the instant petition and reverse the decision below.

B. Mr. Vigil's acts were not wrongful

Count 24 of the Fifth Superseding Indictment Charged:

> Between May 2, 2005 and September 15, 2005, both dates being approximate and inclusive, in the State and District of New Mexico, the defendant Robert Vigil, did knowingly and unlawfully affect and attempt to affect interstate commerce and the movement of

> articles and commodities in interstate commerce by extortion, in that the defendant Robert Vigil attempted to cause George Everage to provide money and property to another person, with Everage's consent, induced by wrongful use and threat to use economic harm and under color or official right, in connection with Everage's efforts to work as the Securities Lending Oversight Manager for the New Mexico State Treasurer's Office.

Under Count 24 of the Fifth Superseding Indictment and Tenth Circuit case law, the government had to prove three essential elements to sustain a conviction under the Hobbs Act:

> *First*: the Defendant wrongfully obtained property from another with that person's consent;
>
> *Second*: the Defendant did so under color of official right or by use of actual or threatened force, violence or fear; and
>
> *Third*: the Defendant's conduct affected interstate commerce.

See 10th Cir. Pattern Instruction 2.71.

Mr. Vigil's conduct underlying Count 24 was not "wrongful" as required by the Hobbs Act. Wrongful has been defined as contrary to law. *See, e.g., Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 25

(2006) (legislative history defining wrongful as in violation of the criminal laws). The Tenth Circuit defined the meaning of "wrongful" as: "[W]rongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Vigil*, 523 F.3d 1258, 1263 (10th Cir. 2008) (*quoting*, *United States v. Enmons*, 410 U.S. 396, 400, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

The government asserted at trial that Mr. Vigil's conduct was "wrongful" because he had no lawful claim to the "money" that he allegedly demanded Everage to pay to Samantha Sais as part of the Securities Lending Oversight Manager (SLOM) contract negotiation. The government maintained that it was wrongful for Mr. Vigil to stipulate during contract negotiations that Everage had to include Samantha Sais in his contract proposal and had to agree to financial terms with her, to obtain the contract.

The chief problem with these theories is that the New Mexico State Treasurer, like any state agency chief, has every lawful right to create and administer contracts and to require stipulations on those contracts. This is true even if the prospective contracting party disagrees with the stipulations. Disagreements and hard bargaining during contracting are not wrongful. Hard bargaining in contract negotiations happens in government and the private sector on a daily basis. The remedy for the prospective contracting party if he or she disagrees with the terms is to refuse to bid, negotiate, or simply walk away if terms cannot be

reached. At the very most, the actions of the State Treasurer's Office as detailed in the facts supra amounted to "hard bargaining" over the terms of the SLOM, which is not a crime under the Hobbs Act. This is illustrated in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

In *Wilkie*, this Court reversed a decision from the Tenth Circuit interpreting the Hobbs Act (reversing *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006)).[4] The Bureau of Land Management (BLM) had failed to record an easement across a ranch in Wyoming, so when Robbins bought the ranch and recorded the deed, BLM lost its easement. When Robbins refused to grant the easement again without negotiations, the BLM responded that the federal government does not negotiate. That agency then embarked upon a bitter campaign of harassment to attempt to force Robbins to grant the easement. After many months of abuse Robbins filed a federal RICO lawsuit alleging that the BLM and its agents had engaged in a pattern of extortionate conduct designed to obtain an easement over Robbins' property. He also included a Bivens claim in his complaint.

The Tenth Circuit ruled on interlocutory appeal that Robbins' suit could go forward. The Circuit Court found that the BLM had refused "to maintain the road providing access to Robbins property, cancel[ed] Robbins' special recreation use permit and grazing privileges, [brought] unfounded criminal charges

4. Within the 10th Circuit's opinion, Judge Kelly failed to address or even mention *Wilkie v. Robbins*, 127 S. Ct. 255 (2007), a case from the 10th Circuit which Mr. Vigil analyzed in his opening brief and reply brief.

against Robbins, trespass[ed] on Robbins' private property, and interfere[ed] with Robbins' guest cattle drives." *Robbins*, 433 F.3d at 768. Accordingly, the Tenth Circuit held that these actions could be actionable under RICO as Hobbs Act extortion.

On writ of certiorari, this Court reversed in a 7-2 decision authored by Justice Souter. This Court held that the BLM's actions did not rise to Hobbs Act extortion but instead constituted lawful "hard bargaining." This Court explained that the BLM's actions were merely "hard bargaining intended to induce the plaintiff to come to legitimate terms." 127 S. Ct. at 2602 ; *see also e.g., Brokerage Concepts Inc. v. U.S. Healthcare Inc.*, 140 F.3d 494, 523-24 (1st Cir. 1998) ("What the Act reaches is not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled."); Judge Browning Op. January 12, 2007, at 31, Appendix .

Here, the government's "victim," George Everage, originally proposed the idea of creating a securities lending program through the New Mexico State Treasurer's Office. He pitched the idea of a SLOM to Mr. Vigil and voluntarily quit his job with the State Treasurer's Office to pursue the SLOM contract. As negotiations progressed, the State Treasurer's Office required as part of the SLOM request for proposal (RFP) that someone perform a computer monitoring and reporting component of the contract. Samantha Sais had the qualifications to satisfy this portion of the contract and Mr. Vigil requested that Everage include her. Everage had to include the computer-monitoring

component within his proposal to properly respond to the SLOM RFP.

Even though Everage proposed the idea of a SLOM, Mr. Vigil as State Treasurer had the ultimate authority to decide whether to implement the SLOM as part of any securities lending program to be created. Mr. Vigil, as Treasurer also had the absolute prerogative to hire or fire George Everage or Samantha Sais. Within the ultimate authority to create this program, Mr. Vigil and the Treasurer's Office necessarily had the more limited authority to place stipulations on the SLOM contract. The stipulations could and did include that Everage employ someone with computer skills that the Treasurer deemed necessary. Mr. Montoya testified at some length regarding Samantha Sais' qualifications and her computer skills which would complement Mr. Everage's performance of the SLOM contract.

None of Mr. Vigil's actions as State Treasurer in proposing creation of a securities lending program and negotiating for a SLOM contract with Everage were "wrongful". Taking the government's theory to its logical conclusion, a state agency chief could never propose, as part of a prospective professional services contract, that an individual include someone else in the contract with complementary skills, for fear of violating the Hobbs Act for "extorting" that individual to pay money to someone else. This makes little sense and is contrary to standard practices in government contracting.

Like in *Wilkie*, Mr. Vigil's actions at most constituted "hard bargaining" to attempt to have Mr.

Everage include Samantha Sais within the SLOM. Mr. Vigil did not employ "inherently wrongful means, such as force or threats of force or criminal prosecution." *See Gillmor v. Thomas*, 490 F.3d 791 (10th Cir. 2007) (finding no extortion by county officials enforcing ordinances). Indeed, Mr. Vigil's conduct was far less coercive than the conduct of the BLM officials in *Wilkie*.

Nonetheless, the Tenth Circuit found that the jury was free to conclude that Vigil's "conduct was 'not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property in which the exploiter is not entitled.'" *US v. Vigil*, 523 F.3d 1258, 1263 (10th Cir. 2008) (*quoting, Brokerage Concepts, Inc., v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523-24 (3rd Cir. 1998). The fatal flaw in this argument is that neither Everage nor Vigil nor Sais nor anyone had the right to any commissions under a prospective SLOM contract. The Tenth Circuit opinion necessarily assumed that Everage was entitled to 100% of any SLOM commissions, (l) before the SLOM contract had been finalized and fully negotiated, (2) before any securities lending agent (SLA) contracts were finalized with commissions authorized for a SLOM, and (3) before any trades took place. Yet, the SLOM contract would provide Everage only with a pre-qualified position to have an opportunity for employment if: (1) the State Treasurer's Office implemented a Securities Lending Program with SLAs, (2) the STO made a decision to contract the oversight instead of using in-house staff, (3) if the STO used the SLOM (Everage) then terms and agreements were worked out with Securities Lending Agents for securities lending, (4) the NM STO then approved the SLA contract and (5) the State Department of Finance

approved the arrangement. The SLOM contract did not guarantee Everage the right to conduct securities lending for the State or to profit therefrom. Basically, the SLOM was a set of terms and conditions which would be the starting point in negotiations between the STO and SLAs when and if the STO actually decided to move forward with a securities lending program.

The government's theory at trial was that Vigil committed a crime when Sais was proposed as part of the contract, with her potentially receiving commissions, as opposed to the commissions going to the State. This theory is nonsensical. The NMSTO and Vigil had every right to bargain for the terms and conditions of a professional services SLOM contract, including requiring that the contract be divided between two persons with complementary skills. There is nothing criminal or wrongful about that. It cannot be a crime for a state agency to allow two persons to share a professional services contract and any attendant potential commissions, as opposed to having one person perform the contract with some of the commissions going back to the State.

Whether a crime was committed under the Hobbs Act cannot turn on who Mr. Vigil proposed for the SLOM, i.e., Samantha Sais, the wife of Michael Montoya. Even if Mr. Vigil had political motivations for including Sais in the SLOM contract, that would not convert Mr. Vigil's actions into criminal, "wrongful" conduct under the Hobbs Act. *Cf. United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007) (state procurement official who got a raise after steering a state contract to a political favorite was not guilty of federal mail fraud and bribery statutes,

18 U.S.C. §§ 1341 and 666) ("The idea that it was a federal crime for any office in state or local government to take account of political considerations when deciding how to spend public money is preposterous.").

In reality, the only reason that the transaction had even an appearance of impropriety was because Sais' husband Montoya admitted to illegal kickback activities. If Montoya had simply been a political friend, and Vigil had attempted to land his wife a job at a government agency, no one would seriously argue that the Hobbs Act had been violated. Politicians' attempts to obtain jobs for political allies date to the founding of our country. Simply put, nothing Mr. Vigil did as part of the SLOM negotiation process was "wrongful" as that term is defined in the Hobbs Act.

Mr. Vigil's alleged acts did not affect interstate commerce, nor were they wrongful under the Hobbs Act. Therefore, the Tenth Circuit's affirmation of the district court is in conflict with the rulings of this Honorable Court, and the instant Petition should be granted so that this Court can resolve those conflicts.

REASONS FOR GRANTING THE PETITION

I. Review is necessary because the rule below applies the jurisdictional requirement of the Hobbs Act regarding interstate commerce clause too broadly, sweeping in local acts of individuals and blurring the lines between State and Federal Government.

With respect to the first issue, this Court should grant certiorari for three reasons: First, to rectify the circuit court's overly broad interpretation of the jurisdictional requirement under the Hobbs Act; second, to set clear precedent, bringing the standard for the test back to the original intent of the framers when drafting the commerce clause; and finally, to ensure that the overarching principles of federalism are maintained.

This Court has recognized three categories of legislation authorized by the Commerce Clause: (1) statutes regulating "the use of the channels of interstate commerce;" (2) laws governing "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) statutes regulating activities "that substantially affect interstate commerce." *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (U.S. 1995); *see also Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971). Further, this Court underscored that regulations falling in the third category must bear a "substantial" relationship to interstate commerce. *See Lopez*, 115 S. Ct. at 1630. Approved activities should

have "a close and substantial relation to interstate commerce" or enjoy a "close and intimate relation" to that commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (contrasting those activities with conduct that has only "indirect and remote" effects on interstate commerce). In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Court broadly construed congressional power, holding that Congress was within its power to prohibit racial discrimination by motels serving travelers, despite how local their operations appeared. However, the Court declared that "the determinative test" under the Commerce Clause is whether "the activity sought to be regulated concerns more States than one and has a real and substantial relation to the national interest." *Id.* at 255. In that case, interstate movement of persons (i.e. travelers) is "commerce" which concerns more than one State. *Id.*

In *Lopez*, respondent's conviction for violating the Gun-Free School Zones Act of 1990 after carrying a concealed handgun and bullets to school was reversed. The Court drew a line, only allowing economic activities to be regulated by the Commerce Clause. The *Lopez* concurrence, authored by Justice Thomas, urged the Court to "temper" Congress's commerce power further in future cases. *See Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). Justice Thomas even suggested that he "might be willing to return to the original understanding" of the Commerce Clause as a narrow grant of congressional power. *Id.* at 1650.

The Hobbs Act prohibits extortion and robbery that "in any way or degree . . . affects commerce." 18 U.S.C. § 1951(a) (1994). In 1956, this Court upheld Congress's

power to enact this statute. *See United States v. Green*, 350 U.S. 415 (1956). Hobbs Act prosecutions have since been upheld whenever the defendant threatens a business making purchases or sales across state lines because the potential interference with that trade is sufficient to demonstrate an effect on interstate commerce. *See, e.g., Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Davis*, 30 F.3d 613 (5th Cir. 1994); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994); *United States v. Scaife*, 749 F.2d 338 (6th Cir. 1984). However, Hobbs Act prosecutions should not be upheld whenever the defendant allegedly threatens an individual. The Fifth Circuit refused to apply the Hobbs Act to the robbery of a homeowner under an "employee work disruption" rationale. *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994). The argument under this rationale is that the theft of the individual would disrupt his performance at work, and that this disruption would affect the company's production in interstate commerce. *Id.*

The Fifth Circuit correctly found that this "employee work disruption" rationale, as applied to the theft of an individual's private belongings would render the Hobbs Act "ubiquitous, and any robbery . . . arguably would affect interstate commerce." *Id.* at 100. Like the Supreme Court in *Lopez*, the Fifth Circuit drew a line and was not willing to stand for this type of unlimited application. The line was drawn between thefts directly affecting a business engaged in interstate commerce and those affecting individuals employed by those businesses. *See Collins*, 40 F.3d at 99-100. The Fifth Circuit's reasoning for a narrow interpretation of the Hobbs Act is persuasive. The court acknowledged that

"the Hobbs Act definition of commerce is coextensive with the constitutional definition", and suggested that Congress could not constitutionally punish the theft of these private belongings. *Id.* at 100 (*quoting United States v. Hanigan*, 681 F.2d 1127, 1130 (9th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983)). The court also suggested that it would not construe the Hobbs Act this broadly without a clear signal from Congress that the statute " 'significantly changed the federal-state balance.' " *Id.* at 101 (*quoting United States v. Bass*, 404 U.S. 336, 349 (1971)).

The Second Circuit also reversed a conviction under the Hobbs Act holding that merely showing employment with a company that does business in interstate commerce, without more, stretches the Hobbs Act too far. The Court explained that under such a theory, the extortion or assault of anyone who worked in any capacity at any company that participates in interstate commerce would suffice for federal jurisdiction, blurring the boundaries between state and federal jurisdiction. *United States v. Perrotta*, 313 F.3d 33, 38 (2d Cir. 2002).

Even before *Lopez*, the federal courts sometimes dismissed convictions on the ground that the Government had failed to prove an effect on interstate commerce under the Hobbs Act. *See, e.g., United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990) (finding that attempted extortion did not sufficiently affect interstate commerce because victim would have used personal assets to respond to blackmail); *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982) (finding that the depletion of the personal assets of an employee was not sufficient to show effect on interstate commerce). Here

however, the lower court essentially held that the potential depletion of an individual's funds, who never even indirectly affected interstate commerce, met the standard of affecting commerce because of the possibility that his alter ego business that had never dealt in interstate commerce may affect commerce in the future. This ruling stretches the commerce clause too far. Without some judicial enforcement of the Commerce Clause, the principles of federalism embodied in that clause disappear. *See, Symposium: Reflections on United States v. Lopez: Commerce!!*, Deborah Jones Merritt, 94 Mich. L. Rev. 674, 707 (1995). This is the reason the *Lopez* majority correctly determined that the Court must retain some judicial oversight over the reach of the Commerce Clause. This is also why the 5th Circuit correctly drew the line at depletion of individual assets.

The lack of a clear-cut boundary to the limits of the Commerce Clause undermines the underlying principles of federalism and the lines separating state and federal government. Powers not delegated to the federal government are reserved to the States. *See* U.S. Const. Amend. X. A broad interpretation of what affects commerce, and thus what can be governed by the federal government, unconstitutionally expands federal power and necessarily diminishes state power. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *NLRB v. Jones &*

Laughlin Steel Corp., 301 U.S. 1, 30 (U.S. 1937) (*quoting Schechter Corp. v. United States*, 295 U.S. 495, 549, 550, 554). The Lopez majority stressed that criminal law, like education, is a matter traditionally left to the states. *See United States v. Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995); *see also id.* at 1632 ("Areas such as criminal law enforcement or education [are ones] where States historically have been sovereign."). Since 1980, the annual number of federal criminal cases has expanded by more than fifty percent. Criminal cases now account for almost one-half of all federal trials, and, in some districts, criminal trials swamp civil ones. The federal courts of Southern California, for example, heard six criminal trials for every civil one during 1991. *Symposium: Reflections on United States v. Lopez: Commerce!*, Deborah Jones Merritt, 94 Mich. L. Rev. 674, 707 (1995). Allowing a broad interpretation of the commerce clause blurs the lines separating the State and Federal government and broadens federal jurisdiction to its breaking point. Review is needed to resolve the Tenth Circuit's broad sweeping grant of federal jurisdiction, and to resolve the discrepancy this decision creates with the Fifth and Second Circuits. For all these reasons, the Court should grant certiorari.

II. The decision below ignores and contravenes current Supreme Court precedent ruling that hard bargaining is not wrongful under the Hobbs Act.

The court of appeals has decided an important question of federal law in a way that conflicts with a relevant decision of this Court. This Court ruled in *Wilkie* that hard bargaining was not wrongful. *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007). Mr. Vigil's acts were nothing more than hard bargaining. The Tenth Circuit reached its decision

that Mr. Vigil's acts were wrongful without even mentioning *Wilkie*. There, the agency refused "to maintain the road providing access to Robbins property, cancel[ed] Robbins' special recreation use permit and grazing privileges, [brought] unfounded criminal charges against Robbins, trespass[ed] on Robbins' private property, and interfere[ed] with Robbins' guest cattle drives." to attempt to force Robbins to grant an easement. *Robbins*, 433 F.3d at 768. After many months of abuse Robbins filed a federal RICO lawsuit alleging that the BLM and its agents had engaged in a pattern of extortionate conduct designed to obtain an easement over Robbins' property. This Court held that the BLM's actions did not rise to Hobbs Act extortion but instead constituted lawful "hard bargaining." This Court explained that the BLM's actions were merely "hard bargaining intended to induce the plaintiff to come to legitimate terms." 127 S. Ct. at 2602.

Applying *Wilkie*, Mr. Vigil's alleged threats to Everage to either hire Mrs. Sais or lose the bid for the contract constitutes hard bargaining intended to induce Everage to come to legitimate terms. Respectfully, this court should grant certiorari to remind the Tenth Circuit of the legal precedent this Court set forth in *Wilkie* that the circuit is not following.

In sum, granting certiorari in this case gives this Court an important opportunity to clarify the law regarding the reach and breadth of the Interstate Commerce Clause in the context of the Hobbs Act. It also gives this Court the opportunity to further clarify the meaning of "wrongful" in the Hobbs Act in accord with this Court's *Wilkie* decision.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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